Supreme Court, U.S.
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In The Supreme Court of the United States

JAMES W. WATERS,

Petitioner,

v.

WARDEN, NOTTOWAY CORRECTIONAL CENTER,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Michael Morchower
MORCHOWER, LUXTON & WHALEY
9 East Franklin Street
Richmond, Virginia 23219
(804) 643-0147

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

44 pp

QUESTION PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN DENYING THE PETITIONER'S 28 U.S.C. 2444 PETITION WHICH SOUGHT TO FILE A BELATED 28 U.S.C. 2254 PETITION UNDER THE DOCTRINE OF EQUITABLE TOLLING?

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The Order of the Fourth Circuit Court of Appeals denying Petitioner's 28 U.S.C. 2244 Petition is set forth in the Appendix at A-31.

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying the petitioner's appeal was entered on October 21, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d)(1) one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court, The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review of the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized

by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT OF THE CASE

At the conclusion of a trial by jury in the Circuit Court of the City of Lynchburg on February 14 and 15, 1995, James W. Waters was found guilty of four charges: first degree murder, use of a firearm in the commission of murder, malicious wounding, and use of a firearm in the commission of malicious wounding. The jury recommended a total sentence of 78 years, which sentence was imposed by the Circuit Court in a final judgment entered on February 15, 1995. On March 1, 1995, petitioner noted an appeal of the final judgment to the Court of Appeals of Virginia.

In March 1995, Mr. Waters hired Michael Morchower, an attorney with the law firm of Morchower, Luxton & Whaley, Nine East Franklin Street, Richmond, Virginia 23219, to pursue all available post-conviction remedies. On June 12, 1995, Mr. Morchower filed a timely Petition for Appeal on Mr. Waters' behalf in the Court of Appeals of Virginia. In that Petition for Appeal, Mr. Morchower raised four assignments of error: (1) the trial court erred in instructing the jury on the issue of flight, as the evidence did not support such an instruction; (2) the trial court erred in objecting sua sponte to the admission of evidence that the murder victim had a cocaine-like substance

on his person at the time of his murder; (3) the trial court erred in excluding evidence that the murder victim had a cocaine-like substance on his person at the time of his murder; (4) the evidence adduced at trial was not sufficient to support the jury's verdict. On August 28, 1995, the Court of Appeals of Virginia denied Mr. Waters' appeal, and Mr. Morchower noted an appeal to the Supreme Court of Virginia on behalf of Mr. Waters. On September 27, 1995, Mr. Morchower filed a timely Petition for Appeal in the Supreme Court of Virginia, in which he raised the same four assignments of error. By Order dated March 13, 1996, the Supreme Court of Virginia refused Mr. Waters' Petition for Appeal.

Beginning in April 1996, Mr. Morchower's office corresponded and conferred by telephone with Mr. Waters regarding what issues might be raised in a petition for a writ of habeas corpus. Over the next two years, Mr. Morchower reviewed claims by Mr. Waters of ineffective assistance by his trial counsel and sent drafts of a habeas petition to Mr. Waters for his review.

On June 30, 1998, Mr. Morchower filed a petition for a writ of habeas corpus on behalf of Mr. Waters in the Circuit Court of the City of Lynchburg. In that petition, he argued: (1) that Mr. Waters was denied the effective assistance of counsel when his trial counsel failed to properly question witnesses before trial and to properly investigate whether a substance found on the victim was cocaine; and (2) that Mr. Waters was denied the effective assistance of counsel when his trial counsel failed to investigate and interview alibi witnesses. On December 4, 1998, the Commonwealth responded with a motion to dismiss the habeas petition. A hearing on the motion to dismiss was held in the Lynchburg Circuit Court on November 18, 1999, at the conclusion of which the Circuit Judge dismissed the habeas

petition. Mr. Morchower filed a motion in the Lynchburg Circuit Court on December 9, 1999, asking the court to reconsider its dismissal of the habeas petition, which motion was dismissed that day by the Circuit Court.

On December 16, 1999, Mr. Morchower noted an appeal to the Supreme Court of Virginia from the Circuit Court's judgments of November 18, 1999, dismissing the habeas petition, and of December 9, 1999, denying the motion to reconsider. On February 22, 2000, Mr. Morchower filed a timely Petition for Appeal in the Supreme Court of Virginia, in which Mr. Morchower argued that the Circuit Court had erred in dismissing the habeas petition. By Order dated June 5, 2000, the Supreme Court of Virginia refused Mr. Waters' Petition for Appeal.

28 U.S.C. § 2254 governs applications to a Federal court for a writ of habeas corpus on behalf of a person in custody pursuant to a State court judgment. Subsection (b)(1) of that statute requires that a person applying for habeas review of a State court judgment must first exhaust the remedies available in the courts of that State. As amended in 1996, 28 U.S.C. § 2244(d)(1) provides that a one-year period of limitation applies to an application for Federal habeas review by a person in custody pursuant to the judgment of a State court and that the limitation period runs from the latest of four possible dates:

(E) the date on which the judgment became final by the conclusion of direct review of the expiration of the time for seeking such review;

(F) the date on which the impediment to filing an application created by State action in violation of the Constitution or

laws of the United States is removed, if the applicant was prevented from filing by such State action;

(G) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(H) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Attorneys in Mr. Morchower's office interpreted Sections 2254 and 2244 (d)(1) as meaning that an application for Federal habeas review of a State court judgment could be filed within one year after the exhaustion of the remedies available in the courts of that State. Because Mr. Waters had exhausted the remedies available to him in Virginia's courts on June 5, 2000, the attorney's in Mr. Morchower's office believed that a Federal habeas petition filed within one year of that date would be timely, and on June 4, 2001, they filed a petition for a writ of habeas corpus on behalf of Mr. Waters, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Western District of Virginia. By Order dated July 13, 2001, the United States District Court for the Western District of Virginia dismissed Mr. Waters' habeas as untimely under 28 U.S.C. § 2244(d)(1).

On August 10, 2001, Mr. Morchower noted an appeal to the United States Court of Appeals for the Fourth Circuit from the District Court's judgment of July 13, 2001, dismissing the habeas petition. Mr. Waters' appeal to the

Fourth Circuit was docketed on August 23, 2001, and on September 13, 2001, the Fourth Circuit ordered the case to be submitted on informal briefs. On October 9, 2001, Mr. Morchower filed a timely informal brief on behalf of Mr. Waters in the Fourth Circuit, and by Order dated November 19, 2001, the Fourth Circuit dismissed Mr. Waters' appeal.

Mr. Morchower never addressed the issue of timeliness under 28 U.S.C. § 2244(d)(1) in either his habeas petition to the United States District Court for the Western District of Virginia or in his appeal to the United States Court of Appeals for the Fourth Circuit.

The petitioner then filed a petition in the Fourth Circuit Court of Appeals on August 27, 2002 seeking to have his previous petition heard under the theory of equitable tolling. His petition was denied by order dated October 21, 2002.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DENYING THE PETITIONER'S 28 U.S.C. 2444 PETITION WHICH SOUGHT TO FILE A BELATED 28 U.S.C. 2254 PETITION UNDER THE DOCTRINE OF EQUITABLE TOLLING.

As amended in April 1996, 28 U.S.C. § 2244(d) provides that a federal habeas petition must be filed within one year from the latest of the following:

(a) the date the judgment became final at the end of direct review;

(b) the date on which the unlawful impediment by state action to the filing of the petition is removed;

(c) the date on which the Constitutional right asserted in the petition was first recognized by the United States Supreme Court; or

(d) the date on which the factual basis of the claim presented could have been discovered through due diligence.

In addition, an inmate convicted before April 1996 whose time for filing had otherwise run was given until April 1997 to file a federal habeas petition.

Mr. Water's conviction became final at the conclusion of direct review ninety days after the Virginia Supreme Court refused his original appeal on March 13, 1996. Because he was convicted before April 1996, Mr. Waters had until April 1997 to file a federal habeas petition. This was not done.

The doctrine of equitable tolling preserves a petitioner's claim when strict application of the statute of limitations would be inequitable. When a petitioner has exercised reasonable diligence in investigating and bringing a claim and has been prevented in some extraordinary way from asserting his rights, the limitations period under 28 U.S.C. § 2244(d) is tolled under the doctrine of equitable tolling. See e.g., Davis v. Johnson, 158 F.3d 806 (5th Cir. 1998); Calderon v. U.S. District Court, 128 F.3d 1283 (9th Circ. 1997); Rhodes v. Senkowski, 82 F. Supp. 2d 160 (S.D.N.Y. 2000); Bilodeau v. Angelone, 39 F. Supp. 2d 652 (E.D.Va. 1999); Eisermann v. Penarosa, 33 F. Supp. 2d 1269 (D. Hawaii 1999); Fadayiro v. United States, 30 F. Supp. 2d 772 (D.N.J. 1998); Dietsch v. United States, 2 F. Supp 2d

(D.N.J. 1998); Henderson v. Johnson, 1 F. Supp. 2d 650 (N.D. Tex. 1998).

Mr. Waters hired an attorney, Michael Morchower, to pursue all available post-conviction remedies. One year after conclusion of the state's habeas review of Mr. Waters' convictions, Mr. Morchower filed a Petition under 28 U.S.C.§ 2254 for writ of Habeas Corpus by a Person in State Custody on behalf of Mr. Waters, in the mistaken belief that such filing would be timely. Mr. Morchower never addressed the issue of timeliness under 28 U.S.C. § 2244 (d)(1) in either his § 2254 petition or in his appeal of the dismissal of that petition.

Mr. Waters relied on Mr. Morchower to pursue his post-conviction remedies in a timely manner. Mr. Morchower is a former United States Magistrate and a highly regarded criminal defense attorney with many years' experience. It was reasonable for Mr. Waters to rely on Mr. Morchower to pursue his post-conviction remedies in a timely manner. Based on these facts, it is respectfully submitted that Mr. Waters has exercised reasonable diligence in investigating and binging his claims and that he has been prevented in some extraordinary way from asserting his rights. The limitations period under U.S.C. § 2244(d) should therefore be tolled under the doctrine of equitable tolling.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Honorable Court to grant his petition and issue a Writ of Certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,

Michael Morchower
Morchower, Luxton and Whaley
9 E. Franklin Street
Richmond, Virginia 23219
(804) 643-0147
Counsel for Petitioner

APPENDIX

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

UNITED STATES DISTRICT COURT

District: Western District of Virginia

Name: James W. Waters Prisoner No.: 225928

Case No: ____

Place of confinement: Nottoway Correctional Center, P. O. Box 48, Burkeville, Virginia 23922

Name of Petitioner: James W. Waters
Name of Respondent: Warden, Nottoway Correctional Center

The Attorney General of the State of: Virginia

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Circuit Court of the City of Lynchburg, Lynchburg, Virginia

2. Date of judgment of conviction: 02/15/95

3. Length of sentence: 78 years

4. Nature of offense involved (all counts) First Degree Murder (one count); Malicious Wounding (one count) Use of a Firearm in Commission of a Felony (two counts)

5. What was your plea: not guilty

6. If you pleaded not guilty, what kind of trial did you have: jury

7. Did you testify at the trial: no

8. Did you appeal from the judgment of conviction: yes

9. If you did appeal, answer the following:
   a. Name of court: Court of Appeals of Virginia
   b. Result: Denied
   c. Date of Results and citation, if known: August 28, 1995
   d. Grounds raised: Jury Instruction Regarding Flight; court's refusal to admit evidence of cocaine-like substance; sufficiency of evidence.
   e. If you sought further review of the decision on appeal by a higher state court, please answer the following:
      i. Name of court: Supreme Court of Virginia
      ii. Result: Petition for Appeal was denied
      iii. Date of results and citation, if known: March 13, 1996
      iv. Grounds raised: Jury instruction Regarding Flight; Court's refusal to Admit evidence of cocaine-like substance; sufficiency of evidence.
   f. If you filed a petition for certiorari in the United States Supreme Court...n/a

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal: yes

11. If your answer to 10 was "yes," give the following information:

a. (1) Name of Court: Circuit Court of the City of Lynchburg

(2) Nature of proceeding: Petition for Writ of Habeas Corpus.

(3) Grounds raised: Ineffective Assistance of Counsel.

(4) Did you receive an evidentiary hearing on your petition, application or motion? No.

(5) Result: Dismissed

(6) Date of Result: November 18, 1999

As to any second petition, application or motion give the same information:

b. As to any second petition, application or motion give the same information:

i. Name of court: United States District Court for the Western District of Virginia

ii. Nature of proceeding: Petition under 28 U.S.C. 2254

iii. Grounds raised: Ineffective assistance of counsel.

iv. Did you receive an evidentiary hearing on your petition, application or motion: No

v. Result: Dismissed

vi. Date of result: July 13, 2001

c. Did you appeal to the highest state court having jurisdicion the result of action takenon any petition, application or motion:

i. First petition, etc: yes

ii. Second petition, etc. yes

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating

additional grounds and *facts* supporting the same. Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date...

a. Ground one: Ineffective Assistance of Counsel. Supporting FACTS (state briefly without citing cases or law): Counsel for Mr. Waters excused a witness who could have been called to testify that a cocaine-like substance was found on the victim thus proving that the victim was involved in a drug transaction at the time of his death; Counsel for Mr. Waters did not have the cocaine-like substance tested by a laboratory to determine whether or not it was cocaine—as a result the trial court refused to allow it into evidence.

b. Ground two: Ineffective Assistance of Counsel: Supporting FACTS (state briefly without citing cases or law): Trial counsel for Mr. Waters failed to contact and interview Mopnica Byrd and Crystal Barber both of whom could have provided Mr. Waters with an alibi by testifying that he was in another location at the time of the shooting.

13. n/a

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack: __

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
    a. At preliminary hearing: Gregory W. Smith, P.O. Box 127, Madison Heights, VA 24572.
    b. At arraignment and plea: same
    c. At trial: same
    d. At sentencing: same
    e. On appeal: Michael Morchower, 9 E. Frankling Street, Richmond, Virginia 23219
    f. In any post-conviction proceeding: same
    g. On appeal from any adverse ruling in a post-conviction proceeding: same

16. Were you sentenced on more than one count of an indictment or on more than one indictment, in the same court and at the same time: yes

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack: no

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Andrea C. Long
Signature of Attorney

I declare under penalty of perjury that the foregoing is true and correct. Executed on 08/27/02

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

JAMES W. WATERS
Inmate No. 180175 **Petitioner,**

Record No.

WARDEN, NOTTOWAY
CORRECTIONAL CENTER, **Respondent.**

MEMORANDUM OF LAW IN SUPPORT OF PETITION UNDER 28 USC § 2254

COMES NOW James W. Waters, by counsel, and respectfully submits this Memorandum of Law in Support of his Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody.

QUESTION PRESENTED

WHETHER THE LIMITATIONS PERIOD UNDER 28 U.S.C. § 2244(d) IS TOLLED UNDER THE DOCTRINE OF EQUITABLE TOLLING.

STATEMENT OF FACTS

At the conclusion of a trial by jury in the Circuit Court of the City of Lynchburg on February 14 and 15, 1995, James W. Waters was found guilty of four charges: first degree murder, use of a firearm in the commission of murder, malicious wounding, and use of a firearm in the commission of malicious wounding. The jury recommended a total sentence of 78 years, which sentence was imposed by the Circuit Court in a final judgment entered on February 15, 1995. Mr. Waters was represented at trial by Gregory w. Smith, Esquire, P.O. Box 127, 2311 Amherst Highway, Madison Heights, Virginia 24572. On March 1, 1995, Mr.

Smith noted an appeal of the final judgment to the Court of Appeals of Virginia.

In March 1995, Mr. Waters hired Michael Morchower, an attorney with the law firm of Morchower, Luxton & Whaley, Nine East Franklin Street, Richmond, Virginia 23219, to pursue all available post-conviction remedies. On June 12, 1995, Mr. Morchower filed a timely Petition for Appeal on Mr. Waters' behalf in the Court of Appeals of Virginia. In that Petition for Appeal, Mr. Morchower raised four assignments of error: (1) the trial court erred in instructing the jury on the issue of flight, as the evidence did not support such an instruction; (2) the trial court erred in objecting sua sponte to the admission of evidence that the murder victim had a cocaine-like substance on his person at the time of his murder; (3) the trial court erred in excluding evidence that the murder victim had a cocaine-like substance on his person at the time of his murder; (4) the evidence adduced at trial was not sufficient to support the jury's verdict. On August 28, 1995, the Court of Appeals of Virginia denied Mr. Waters' appeal, and Mr. Morchower noted an appeal to the Supreme Court of Virginia on behalf of Mr. Waters. On September 27, 1995, Mr. Morchower filed a timely Petition for Appeal in the Supreme Court of Virginia, in which he raised the same four assignments of error. By Order dated March 13, 1996, the Supreme Court of Virginia refused Mr. Waters' Petition for Appeal.

Beginning in April 1996, Mr. Morchower's office corresponded and conferred by telephone with Mr. Waters regarding what issues might be raised in a petition for a writ of habeas corpus. Over the next two years, Mr. Morchower reviewed claims by Mr. Waters of ineffective assistance by his trial counsel and sent drafts of a habeas petition to Mr. Waters for his review.

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28 U.S.C. § 2254 governs applications to a Federal court for a writ of habeas corpus on behalf of a person in custody pursuant to a State court judgment. Subsection (b)(1) of that statute requires that a person applying for habeas review of a State court judgment must first exhaust the remedies available in the courts of that State. As amended in 1996, 28 U.S.C. § 2244(d)(1) provides that a one-year period of limitation applies to an application for Federal

habeas review by a person in custody pursuant to the judgment of a State court and that the limitation period runs from the latest of four possible dates:

(A) the date on which the judgment became final by the conclusion of direct review of the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Attorneys in Mr. Morchower's office interpreted Sections 2254 and 2244 (d)(1) as meaning that an application for Federal habeas review of a State court judgment could be filed within one year after the exhaustion of the remedies available in the courts of that State. Because Mr. Waters had exhausted the remedies available to him in Virginia's courts on June 5, 2000, the attorney's in Mr. Morchower's office believed that a Federal habeas petition filed within one year of that date would be timely, and on June 4, 2001, they filed a petition for a writ of habeas corpus on behalf of Mr.

Waters, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Western District of Virginia. By Order dated July 13, 2001, the United States District Court for the Western District of Virginia dismissed Mr. Waters' habeas as untimely under 28 U.S.C. § 2244(d)(1).

On August 10, 2001, Mr. Morchower noted an appeal to the United States Court of Appeals for the Fourth Circuit from the District Court's judgment of July 13, 2001, dismissing the habeas petition. Mr. Waters' appeal to the Fourth Circuit was docketed on August 23, 2001, and on September 13, 2001, the Fourth Circuit ordered the case to be submitted on informal briefs. On October 9, 2001, Mr. Morchower filed a timely informal brief on behalf of Mr. Waters in the Fourth Circuit, and by Order dated November 19, 2001, the Fourth Circuit dismissed Mr. Waters' appeal.

Mr. Morchower never addressed the issue of timeliness under 28 U.S.C. § 2244(d)(1) in either his habeas petition to the United States District Court for the Western District of Virginia or in his appeal to the United States Court of Appeals for the Fourth Circuit.

ARGUMENT

THE LIMITATIONS PERIOD UNDER 28 U.S.C. § 2244(d) IS TOLLED UNDER THE DOCTRINE OF EQUITABLE TOLLING.

As amended in April 1996, 28 U.S.C. § 2244(d) provides that a federal habeas petition must be filed within one year from the latest of the following:

(a) the date the judgment became final at the end of direct review;

(b) the date on which the unlawful impediment by state action to the filing of the petition is removed;

(c) the date on which the Constitutional right asserted in the petition was first recognized by the United States Supreme Court; or
(d) the date on which the factual basis of the claim presented could have been discovered through due diligence.

In addition, an inmate convicted before April 1996 whose time for filing had otherwise run was given until April 1997 to file a federal habeas petition.

Mr. Water's conviction became final at the conclusion of direct review ninety days after the Virginia Supreme Court refused his original appeal on March 13, 1996. Because he was convicted before April 1996, Mr. Waters had until April 1997 to file a federal habeas petition. This was not done.

The doctrine of equitable tolling preserves a petitioner's claim when strict application of the statute of limitations would be inequitable. When a petitioner has exercised reasonable diligence in investigating and bringing a claim and has been prevented in some extraordinary way from asserting his rights, the limitations period under 28 U.S.C. § 2244(d) is tolled under the doctrine of equitable tolling. See e.g., Davis v. Johnson, 158 F.3d 806 (5th Cir. 1998); Calderon v. U.S. District Court, 128 F.3d 1283 (9th Circ. 1997); Rhodes v. Senkowski, 82 F. Supp. 2d 160 (S.D.N.Y. 2000); Bilodeau v. Angelone, 39 F. Supp. 2d 652 (E.D.Va. 1999); Eisermann v. Penarosa, 33 F. Supp. 2d 1269 (D. Hawaii 1999); Fadayiro v. United States, 30 F. Supp. 2d 772 (D.N.J. 1998); Dietsch v. United States, 2 F. Supp 2d (D.N.J. 1998); Henderson v. Johnson, 1 F. Supp. 2d 650 (N.D. Tex. 1998).

Mr. Waters hired an attorney, Michael Morchower, to pursue all available post-conviction remedies. One year after

conclusion of the state's habeas review of Mr. Waters' convictions, Mr. Morchower filed a Petition under 28 U.S.C.§ 2254 for writ of Habeas Corpus by a Person in State Custody on behalf of Mr. Waters, in the mistaken belief that such filing would be timely. Mr. Morchower never addressed the issue of timeliness under 28 U.S.C. § 2244 (d)(1) in either his § 2254 petition or in his appeal of the dismissal of that petition.

Mr. Waters relied on Mr. Morchower to pursue his post-conviction remedies in a timely manner. Mr. Morchower is a former United States Magistrate and a highly regarded criminal defense attorney with many years' experience. It was reasonable for Mr. Waters to rely on Mr. Morchower to pursue his post-conviction remedies in a timely manner. Based on these facts, it is respectfully submitted that Mr. Waters has exercised reasonable diligence in investigating and binging his claims and that he has been prevented in some extraordinary way from asserting his rights. The limitations period under U.S.C. § 2244(d) should therefore be tolled under the doctrine of equitable tolling.

Respectfully submitted,
JAMES W. WATERS.

By:_____

Andrea C. Long
BOONE, BEALE, COSBY & LONG
27 North 17th Street
Richmond, Virginia 23219
(804) 780-1729

UNITED STATES COUR OF APPEALS
FOR THE FOURTH CIRCUIT

Name of Movant: James W. Waters

Prisoner Number: 225928

Place of Confinement:
Nottoway Correctional Center, P. O. Box 488,
Burkeville, Virginia 23922

IN RE: JAMES W. WATERS, **Movant**

1. Name and location of court which entered the judgment of conviction from which relief is sought:

   Circuit Court of the City of Lynchburg,
   Lynchburg, Virginia.

2. Parties' Names:
   Commonwealth of Virginia
   Vs.
   James W. Waters.

3. Docket Number:
   CR94005919

4. Date filed:
   09/06/94

5. Date of judgment of conviction:
   02/15/95

6. Length of sentence:
   78 years

7. Nature of offense(s) involved (all counts)
   First Degree Murder (one count)

Malicious Wounding (one count)
Use of a firearm in the commission of a
Felony (two counts)

8. What was your plea:
Not Guilty

9. If you pleaded not guilty, what kind of trial did you have:
Jury

10. Did you testify at your trial:
No

11. Did you appeal from the judgment of conviction:
Yes

12. If you did appeal, what was the:
Name of court appealed to:
Court of Appeals of Virginia
Parties' names on appeal:
James W. Waters
Vs.
Commonwealth of Virginia
Docket number of appeal:
0447-95-3
Date of decision:
08/28/95
Result of appeal:
Petition for Appeal was denied.

13. Other than a direct appeal from the judgment of conviction and sentence, have you filed any other petitions, applications for relief, or other motions regarding this judgment in any federal court:
Yes

14. If you answered "Yes" to question 13, answer the following questions:

a. First Petition, Application, or Motion
   i. In what court did you file the petition, application, or motion: Western District of Virginia
   ii. What were the parties' names: James W. Waters vs. Warden, Greensville Correctional Center
   iii. What was the docket number of the case: 7:01-CV-00432
   iv. What relief did you seek: Writ of habeas corpus
   v. What grounds for relief did you state in your petition , application, or motion: Ineffective assistance of counsel
   vi. Did the court hold an evidentiary hearing on your petition, application or motion: No
   vii. What result: n/a
   viii. Date of court's decision: 07/13/0

b. Second Petition, Application or Motion: n/a

c. Third and Subsequent Petitions...: n/a

d. Prior Appellate Review(s). Did you appeal the results of your petitions, applications, or motions to a federal court of appeals having jurisdiction oer your case? If so, list the docket mumbers and dates of final disposition for all subsequent petitions, applications, or motions filed in a federal court of appeals.

First petition, application, or motion: Appeal No. 01-7351. Date of final disposition: 11/19/01

15. Did you present any of the claims in this application in any previous petition, application or motion for relief under 28 § U.S.C. 2254 or § 2255? Yes

16. If your answer to question 15 is "yes" give the docket number(s) and court(s) in which such claims were raised and state the basis on which relief was denied: Civil Action No. 7:01-CV-00432 U.S. District court for the Western District of Virginia. Petition was dismissed as untimely under the one-year statute of limitations.

17. If your answer to question 15 is "no," why not? N/a

Movant prays that the United States Court of Appeals for the Fourth Circuit grant an Order Authorizing the District Court to Consider Movant's Second or Successive Application for Relief Under 28 U.S.C. §§ 2254 or 2255.

Andrea C. Long
Movant's Signature

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct.
Executed on October 7, 2002

Andrea C. Long
Movant's Signature

PROOF OF SERVICE

A copy of this motion and all attachments must be sent to the state attorney general (§ 22534 cases) or the United

States Attorney for the United States Judicial district in which you were convicted (§ 2255 cases).

I certify that on October 7, 2002 I mailed a copy of this motion and all attachments to Jerry W. Kilgore, Attorney General at the following address: Office of the Attorney General, 900 East Main Street, Richmong, Virginia 23219.

Andrea Long
Movant's signature

James W. Waters
Signature of Petitioner

UNITED STATES COUR OF APPEALS
FOR THE FOURTH CIRCUIT

Name of Movant: James W. Waters

Prisoner Number: 225928

Place of Confinement:
Nottoway Correctional Center, P. O. Box 488,
Burkeville, Virginia 23922

IN RE: JAMES W. WATERS, **Movant**

1. Name and location of court which entered the judgment of conviction from which relief is sought:

Circuit Court of the City of Lynchburg,
Lynchburg, Virginia.

1. Parties' Names:
Commonwealth of Virginia
Vs.
James W. Waters.

2. Docket Number:
CR94005919

3. Date filed:
09/06/94

4. Date of judgment of conviction:
02/15/95

5. Length of sentence:
78 years

6. Nature of offense(s) involved (all counts)
   First Degree Murder (one count)
   Malicious Wounding (one count)
   Use of a firearm in the commission of a Felony (two counts)

7. What was your plea:
   Not Guilty

8. If you pleaded not guilty, what kind of trial did you have:
   Jury

9. Did you testify at your trial:
   No

10. Did you appeal from the judgment of conviction:
    Yes

11. If you did appeal, what was the:
    Name of court appealed to:
    Court of Appeals of Virginia
    Parties' names on appeal:
    James W. Waters
    Vs.
    Commonwealth of Virginia
    Docket number of appeal:
    0447-95-3
    Date of decision:
    08/28/95
    Result of appeal:
    Petition for Appeal was denied.

12. Other than a direct appeal from the judgment of conviction and sentence, have you filed any other petitions, applications for relief, or other motions regarding this judgment in any federal court:
    Yes

13. If you answered "Yes" to question 13, answer the following questions:

a. First Petition, Application, or Motion
   i. In what court did you file the petition, application, or motion: Western District of Virginia
   ii. What were the parties' names: James W. Waters vs. Warden, Greensville Correctional Center
   iii. What was the docket number of the case: 7:01-CV-00432
   iv. What relief did you seek: Writ of habeas corpus
   v. What grounds for relief did you state in your petition , application, or motion: Ineffective assistance of counsel
   vi. Did the court hold an evidentiary hearing on your petition, application or motion: No
   vii. What result: n/a
   viii. Date of court's decision: 07/13/0

b. Second Petition, Application or Motion: n/a

c. Third and Subsequent Petitions...: n/a

d. Prior Appellate Review(s). Did you appeal the results of your petitions, applications, or motions to a federal court of appeals having jurisdiction oer your case? If so, list the docket mumbers and dates of final disposition for all subsequent petitions, applications, or motions filed in a federal court of appeals.

First petition, application, or motion: Appeal No. 01-7351. Date of final disposition: 11/19/01

14. Did you present any of the claims in this application in any previous petition, application or motion for relief under 28 § U.S.C. 2254 or § 2255? Yes

15. If your answer to question 15 is "yes" give the docket number(s) and court(s) in which such claims were raised and state the basis on which relief was denied: Civil Action No. 7:01-CV-00432 U.S. District court for the Western District of Virginia. Petition was dismissed as untimely under the one-year statute of limitations.

16. If your answer to question 15 is "no," why not? N/a

Movant prays that the United States Court of Appeals for the Fourth Circuit grant an Order Authorizing the District Court to Consider Movant's Second or Successive Application for Relief Under 28 U.S.C. §§ 2254 or 2255.

Andrea C. Long
Movant's Signature

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct.
Executed on October 7, 2002

Andrea C. Long
Movant's Signature

PROOF OF SERVICE

A copy of this motion and all attachments must be sent to the state attorney general (§ 22534 cases) or the United

States Attorney for the United States Judicial district in which you were convicted (§ 2255 cases).

I certify that on October 7, 2002 I mailed a copy of this motion and all attachments to Jerry W. Kilgore, Attorney General at the following address: Office of the Attorney General, 900 East Main Street, Richmong, Virginia 23219.

Andrea Long
Movant's signature

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES W. WATERS
Inmate No. 180175 **Petitioner,**

Record No.

WARDEN, MOTTOWAY CORRECTIONAL CENTER, **Respondent.**

MEMORANDUM OF LAW IN SUPPORT OF MOTION UNDER 28 USC § 2244 FOR ORDER AUTHORIZING DISTRICT COURT TO CONSIDER SECOND APPLICATION FOR RELIEF UNDER 28 USC § 2254

COMES NOW James W. Waters, by counsel, and respectfully submits this Memorandum of Law in Support of his Motion under 28 U.S.C. § 2244 for an Order Authorizing District Court to Consider Second Application for Relief under 28 U.S.C § 2254.

QUESTION PRESENTED

WHETHER THE LIMITATIONS PERIOD UNDER 28 U.S.C. § 2244(d) IS TOLLED UNDER THE DOCTRINE OF EQUITABLE TOLLING.

STATEMENT OF FACTS

At the conclusion of a trial by jury in the Circuit Court of the City of Lynchburg on February 14 and 15, 1995, James W. Waters was found guilty of four charges: first degree murder, use of a firearm in the commission of murder, malicious wounding, and use of a firearm in the commission of malicious wounding. The jury recommended a total sentence of 78 years, which sentence was imposed by the Circuit Court in a final judgment entered on February 15,

1995. Mr. Waters was represented at trial by Gregory w. Smith, Esquire, P.O. Box 127, 2311 Amherst Highway, Madison Heights, Virginia 24572. On March 1, 1995, Mr. Smith noted an appeal of the final judgment to the Court of Appeals of Virginia.

In March 1995, Mr. Waters hired Michael Morchower, an attorney with the law firm of Morchower, Luxton & Whaley, Nine East Franklin Street, Richmond, Virginia 23219, to pursue all available post-conviction remedies. On June 12, 1995, Mr. Morchower filed a timely Petition for Appeal on Mr. Waters' behalf in the Court of Appeals of Virginia. In that Petition for Appeal, Mr. Morchower raised four assignments of error: (1) the trial court erred in instructing the jury on the issue of flight, as the evidence did not support such an instruction; (2) the trial court erred in objecting sua sponte to the admission of evidence that the murder victim had a cocaine-like substance on his person at the time of his murder; (3) the trial court erred in excluding evidence that the murder victim had a cocaine-like substance on his person at the time of his murder; (4) the evidence adduced at trial was not sufficient to support the jury's verdict. On August 28, 1995, the Court of Appeals of Virginia denied Mr. Waters' appeal, and Mr. Morchower noted an appeal to the Supreme Court of Virginia on behalf of Mr. Waters. On September 27, 1995, Mr. Morchower filed a timely Petition for Appeal in the Supreme Court of Virginia, in which he raised the same four assignments of error. By Order dated March 13, 1996, the Supreme Court of Virginia refused Mr. Waters' Petition for Appeal.

Beginning in April 1996, Mr. Morchower's office corresponded and conferred by telephone with Mr. Waters regarding what issues might be raised in a petition for a writ of habeas corpus. Over the next two years, Mr. Morchower reviewed claims by Mr. Waters of ineffective assistance by

his trial counsel and sent drafts of a habeas petition to Mr. Waters for his review.

On June 30, 1998, Mr. Morchower filed a petition for a writ of habeas corpus on behalf of Mr. Waters in the Circuit Court of the City of Lynchburg. In that petition, he argued: (1) that Mr. Waters was denied the effective assistance of counsel when his trial counsel failed to properly question witnesses before trial and to properly investigate whether a substance found on the victim was cocaine; and (2) that Mr. Waters was denied the effective assistance of counsel when his trial counsel failed to investigate and interview alibi witnesses. On December 4, 1998, the Commonwealth responded with a motion to dismiss the habeas petition. A hearing on the motion to dismiss was held in the Lynchburg Circuit Court on November 18, 1999, at the conclusion of which the Circuit Judge dismissed the habeas petition. Mr. Morchower filed a motion in the Lynchburg Circuit Court on December 9, 1999, asking the court to reconsider its dismissal of the habeas petition, which motion was dismissed that day by the Circuit Court.

On December 16, 1999, Mr. Morchower noted an appeal to the Supreme Court of Virginia from the Circuit Court's judgments of November 18, 1999, dismissing the habeas petition, and of December 9, 1999, denying the motion to reconsider. On February 22, 2000, Mr. Morchower filed a timely Petition for Appeal in the Supreme Court of Virginia, in which Mr. Morchower argued that the Circuit Court had erred in dismissing the habeas petition. By Order dated June 5, 2000, the Supreme Court of Virginia refused Mr. Waters' Petition for Appeal.

28 U.S.C. § 2254 governs applications to a Federal court for a writ of habeas corpus on behalf of a person in custody pursuant to a State court judgment. Subsection (b)(1) of that statute requires that a person applying for habeas review of a State court judgment must first exhaust the

remedies available in the courts of that State. As amended in 1996, 28 U.S.C. § 2244(d)(1) provides that a one-year period of limitation applies to an application for Federal habeas review by a person in custody pursuant to the judgment of a State court and that the limitation period runs from the latest of four possible dates:

(A) the date on which the judgment became final by the conclusion of direct review of the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Attorneys in Mr. Morchower's office interpreted Sections 2254 and 2244 (d)(1) as meaning that an application for Federal habeas review of a State court judgment could be filed within one year after the exhaustion of the remedies available in the courts of that State. Because Mr. Waters had exhausted the remedies available to him in Virginia's courts on June 5, 2000, the attorney's in Mr. Morchower's office believed that a Federal habeas petition filed within one year

of that date would be timely, and on June 4, 2001, they filed a petition for a writ of habeas corpus on behalf of Mr. Waters, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Western District of Virginia. By Order dated July 13, 2001, the United States District Court for the Western District of Virginia dismissed Mr. Waters' habeas as untimely under 28 U.S.C. § 2244(d)(1).

On August 10, 2001, Mr. Morchower noted an appeal to the United States Court of Appeals for the Fourth Circuit from the District Court's judgment of July 13, 2001, dismissing the habeas petition. Mr. Waters' appeal to the Fourth Circuit was docketed on August 23, 2001, and on September 13, 2001, the Fourth Circuit ordered the case to be submitted on informal briefs. On October 9, 2001, Mr. Morchower filed a timely informal brief on behalf of Mr. Waters in the Fourth Circuit, and by Order dated November 19, 2001, the Fourth Circuit dismissed Mr. Waters' appeal.

Mr. Morchower never addressed the issue of timeliness under 28 U.S.C. § 2244(d)(1) in either his habeas petition to the United States District Court for the Western District of Virginia or in his appeal to the United States Court of Appeals for the Fourth Circuit.

ARGUMENT

THE LIMITATIONS PERIOD UNDER 28 U.S.C. § 2244(d) IS TOLLED UNDER THE DOCTRINE OF EQUITABLE TOLLING.

As amended in April 1996, 28 U.S.C. § 2244(d) provides that a federal habeas petition must be filed within one year from the latest of the following:

(a) the date the judgment became final at the end of direct review;

(b) the date on which the unlawful impediment by state action to the filing of the petition is removed;

(c) the date on which the Constitutional right asserted in the petition was first recognized by the United States Supreme Court; or

(d) the date on which the factual basis of the claim presented could have been discovered through due diligence.

In addition, an inmate convicted before April 1996 whose time for filing had otherwise run was given until April 1997 to file a federal habeas petition.

Mr. Water's conviction became final at the conclusion of direct review ninety days after the Virginia Supreme Court refused his original appeal on March 13, 1996. Because he was convicted before April 1996, Mr. Waters had until April 1997 to file a federal habeas petition. This was not done.

The doctrine of equitable tolling preserves a petitioner's claim when strict application of the statute of limitations would be inequitable. When a petitioner has exercised reasonable diligence in investigating and bringing a claim and has been prevented in some extraordinary way from asserting his rights, the limitations period under 28 U.S.C. § 2244(d) is tolled under the doctrine of equitable tolling. See e.g., Davis v. Johnson, 158 F.3d 806 (5th Cir. 1998); Calderon v. U.S. District Court, 128 F.3d 1283 (9th Circ. 1997); Rhodes v. Senkowski, 82 F. Supp. 2d 160 (S.D.N.Y. 2000); Bilodeau v. Angelone, 39 F. Supp. 2d 652 (E.D.Va. 1999); Eisermann v. Penarosa, 33 F. Supp. 2d 1269 (D. Hawaii 1999); Fadayiro v. United States, 30 F. Supp. 2d 772 (D.N.J. 1998); Dietsch v. United States, 2 F. Supp 2d

(D.N.J. 1998); Henderson v. Johnson, 1 F. Supp. 2d 650 (N.D. Tex. 1998).

Mr. Waters hired an attorney, Michael Morchower, to pursue all available post-conviction remedies. One year after conclusion of the state's habeas review of Mr. Waters' convictions, Mr. Morchower filed a Petition under 28 U.S.C.§ 2254 for writ of Habeas Corpus by a Person in State Custody on behalf of Mr. Waters, in the mistaken belief that such filing would be timely. Mr. Morchower never addressed the issue of timeliness under 28 U.S.C. § 2244 (d)(1) in either his § 2254 petition or in his appeal of the dismissal of that petition.

Mr. Waters relied on Mr. Morchower to pursue his post-conviction remedies in a timely manner. Mr. Morchower is a former United States Magistrate and a highly regarded criminal defense attorney with many years' experience. It was reasonable for Mr. Waters to rely on Mr. Morchower to pursue his post-conviction remedies in a timely manner. Based on these facts, it is respectfully submitted that Mr. Waters has exercised reasonable diligence in investigating and bringing his claims and that he has been prevented in some extraordinary way from asserting his rights. The limitations period under U.S.C. § 2244(d) should therefore be tolled under the doctrine of equitable tolling.

Respectfully submitted,
JAMES W. WATERS.

By:_____

Andrea C. Long
BOONE, BEALE, COSBY & LONG
27 North 17th Street
Richmond, Virginia 23219
(804) 780-1729

ATTACHMENT ONE:

The § 2254 application that Mr. Waters wants to file in the district court if the Court of Appeals grants this Motion.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 02-266

In Re: JAMES W. WATERS

Movant

ORDER

Movant has filed a motion pursuant to 28 U.S.C. Section 2244 for authorization to file a successive application for relief.

The Court denies the motion.

Entered at the direction of Judge Wilkins, with the concurrence of Judge Michael and Judge King.

For the Court,

/s/ Patricia S.Connor